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## Subsaharan Africa

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## SUBSAHARAN AFRICA

### **FREEDOM OF EXPRESSION VIS-À-VIS NATIONAL SECURITY: THE NEED TO STRIKE THE BALANCE IN EASTERN AFRICA**

With increasing security threats, Eastern African nations are at the crossroads of balancing national security and freedom of expression. The volatile geopolitics of the region may generally justify a broader margin of appreciation in favor of national security. However, if that discretion is abused, it becomes counterproductive as a systemic suppression of freedoms may be a national security threat in itself, especially in a region characterized by porous borders, ethnic and religious diversity, and secessionist tendencies and realities.

In December 2014, the Kenyan Parliament passed the Security Laws (Amendment) Bill, which amends about twenty-one existing parliamentary acts. Human rights activists and Kenyan opposition consider the bill “draconian.” It introduces a new section to the National Intelligence Services Act to grant the Director-General the power to authorize mass surveillance of communications for national security purposes. The bill also adds a section to the Prevention of Terrorism Act to criminalize the publication of photographs of victims of terrorist attacks without the consent of the National Police Service and the victim.

The Kenyan Government considers the bill a response to recurring terrorist attacks from Al-Shabaab, an Al-Qaeda-affiliated group based in neighboring Somalia. Since 2010, the group has taken responsibility for multiple attacks, including bombings in Kampala, Uganda; the attack on Westgate mall in 2013, and a 2014 attack that killed 28 in Kenya.

In 2009, Ethiopia passed an anti-terrorism law based on similar justifications. According to United Nations experts and other rights groups, the Ethiopian Government is using the Anti-Terrorism Proclamation to suppress various

rights, including freedom of expression, by prosecuting “journalists, bloggers, and opposition politicians.” Meanwhile, some claim that Ethiopia experienced fewer attacks after the new law took effect, and have been advising Kenya to learn from Ethiopia. The United Kingdom has insisted that Kenya pass a tight anti-terrorism law since 2011.

The debate over the Kenyan bill highlights the fundamental challenge of balancing freedoms and national security in the region. Unstable geopolitical situation may provide nations with a broader margin of discretion in favoring their security. However, the discretion is not unlimited under international human rights law. The International Covenant on Civil and Political Rights (ICCPR), to which all eastern African nations except South Sudan are parties, provides for the right to freedom of expression under Article 19, but recognizes national security as a legitimate justification to restrict the freedom.

Ensuring national security is a fundamental precondition to safeguard human rights including freedom of expression. National security may be invoked in response to situations that may threaten the existence of a nation, its territorial integrity, or its political independence. However, restrictions based on security interests must have a genuine purpose and demonstrable effect of protecting national security. It may not be invoked to impose arbitrary restrictions or perpetuate systematic violation of human rights. The United Nations Human Rights Committee General Comment 34 also calls for strict adherence to the tests of necessity and proportionality.

Nations have a general discretion to define what constitutes a national security threat. In east Africa, territorial integrity may be a key interest for several reasons. Firstly, the region is arguably one of world's most volatile. The region witnessed two recent successful secessionist movements leading to the creation of Eritrea and South Sudan. Neither movement delivered the freedoms they promised. Rather, Eritrea is considered by some to be state sponsor

of terrorism, and civil war is still waging South Sudan. Secondly, in the region is also war-torn Somalia, which has been referred to as a “failed State,” where groups such as Al-Shabaab and Al Ittihad al Islamiya are based. Additionally, the fact that nations in region share porous borders with similar ethnic demographics, languages, or religion may enhance adjacent countries’ real or perceived susceptibility to security concerns.

Counterterrorism may unavoidably be incompatible with human rights as fighting terrorism “necessarily involves the state taking on new powers of surveillance and enforcement.” However, states need to act in good faith taking into account the exigencies of the situation as required by the Siracusa and Johannesburg Principles on limiting freedoms. States need to recognize that systematic violations of human rights by themselves may ultimately lead to national security threats. It is important to note that the secessionist movements that created Eritrea and South Sudan were responses to grave human rights situations in the respective nations.

It may be difficult to tailor the actual breadth of security laws in advance of the situations they purport to govern. Thus, the guiding principle should be that laws too suppressive of freedom of expression are national security threats in themselves.

### **BEYOND THE ELECTION OF MUGABE AS AFRICAN UNION CHAIR**

On January 30, 2015, African leaders appointed Zimbabwean President Robert Mugabe as the African Union’s (AU) next Chair. The ninety year-old Mugabe took the one “year-long rotating chairmanship” succeeding Mauritanian President Mohamed Ould Abdel Aziz. The Union elected Mugabe amidst allegations of human rights abuses by his regime, and longstanding travel bans and sanctions by the European Union and the United States. The post, though ceremonial, may implicate the Union’s position of non-interference vis-à-vis human rights.

Following the nomination of Mugabe by the Southern African Development Community (SADC), which he also chairs until August 2015,

the Union’s senior officials expressed contrasting views on approving the appointment. While the AU Commission Chairperson Nkosazana Dlamini-Zuma emphasized the Union’s goals to be “democracy, good governance and human rights,” her deputy Erastus Mwencha enquired: “Who am I to say to the people, you have elected the wrong leader?”

In 2007, the Union faced a similar dilemma on the candidacy of Sudanese President Omar Al-Bashir in connection with the Darfur crisis. Instead, the Union elected Ghanaian President John Kufuor on the ground that his nation was celebrating its golden jubilee of independence.

In other situations, the Union welcomed to the same post Libya’s Muammar Gaddafi in 2009 and Equatorial Guinea’s Teodoro Obiang Nguema Mbasogo in 2011, despite objections from civil society groups.

Mugabe’s election may have human rights implications despite the symbolic nature of the post. Firstly, the Union may be regressing to the “sacrosanct” principles of state sovereignty and non-interference; core principles before the Organization of African Unity (OAU) transformed itself into the AU in 2002. These principles were very instrumental during the fight for independence from colonialism. With this transformation, non-interference was supposed to be overridden by emerging values such as human rights.

Secondly, Mugabe’s election, about which Western and African opinions sharply contrast, may intensify the Union’s anti-neocolonial rhetoric. While there is pessimism as to the value Mugabe will add, there is also deep respect and support for him among many African leaders.

In one-way or another, his election may further strengthen the Union’s re-emerging principle of non-interference at the expense of other values such as human rights.

*By Bantayehu Demlie Gezahegn, staff writer*

### **DOMINIC ONGWEN—ICC TO PROSECUTE LRA LEADER**

On Tuesday, January 6, 2015, a man claiming to be Dominic Ongwen, one of the Lord’s Resis-

tance Army's (LRA) top commanders, surrendered to United States military forces in Central African Republic. The following day Ugandan authorities confirmed his identity and explained that U.S. forces were holding him at a military base in Obo. Ongwen's capture gave rise to controversy regarding the jurisdiction under which he would be prosecuted—the options being Uganda's own courts or the International Criminal Court (ICC). However, on January 13, a State Department deputy spokeswoman announced, and the Ugandan Army confirmed, that Ongwen would be transferred to the Hague for prosecution under the ICC, who indicted Ongwen in 2005 on seven counts, including murder and enslavement. At first Uganda appeared reluctant to release Ongwen to the ICC, wishing to prosecute him in the country's own courts instead. Uganda could have exercised its right to prosecute Ongwen because—despite the ICC's jurisdiction over genocide, crimes against humanity, and war crimes—it is a court of last resort, meaning “it will not act if a case is investigated or prosecuted by a national judicial system, unless the national proceedings are not genuine.” Uganda has pardoned thousands of LRA fighters under a 2000 Amnesty Law and some feared that Ongwen's “status as both victim and alleged author of war crimes” could have resulted in such a pardon.

At the ICC, Dominic Ongwen will be prosecuted for his role as a top commander in the LRA, where he served under the group's leader Joseph Kony. Ongwen is charged with crimes against humanity, specifically murder and enslavement. According to Article 7(1)(a) of ICC's Elements of Crimes, in order to prove murder the ICC prosecution will have to show that (1) Ongwen has “killed one or more persons,” (2) that his “conduct was committed as part of a widespread or systematic attack directed against a civilian population,” and (3) that he “knew the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” To prove that Ongwen is guilty of enslavement under Article 7(1)(c), the prosecution must show that (1) Ongwen “exercised any or all of the powers attaching to

the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty,” as well as evidence proving the same components (2) and (3) stated above.

The prosecution may be able to prove the last two elements of both murder and enslavement. The LRA is allegedly to blame for the mass killings of over 100,000 people, and the kidnapping of over 60,000 children. Their acts spanned over a period of thirty years, and occurred across five central African countries. The LRA was forced out of Uganda almost ten years ago for their cruel acts against humanity, such as chopping off prisoners' limbs and abducting young women for sex slavery. Such information suggests that Ongwen's conduct as an LRA commander was “part of a widespread or systematic attack against a civilian population.”

In order for the ICC to find Ongwen guilty of his alleged crimes, the prosecution will need to provide proof of specific instances where Ongwen murdered and deprived civilians of their liberties. A conviction would be, according to Human Rights Watch, an opportunity for victims of the LRA to receive long-awaited justice for the grievances they have suffered.

### **AL-SHABAB'S ATTACK ON GARISSA AND KENYAN RESPONSE**

On April 2, 2015, four armed gunmen attacked the campus of Garissa University College in northeastern Kenya. By nightfall, the death toll, as reported by the Kenyan government, had reached 147 people. The same night, Joseph Nkaissery, the Kenyan Cabinet Secretary for Interior and National Coordination, announced that the Kenyan security forces had killed the four gunmen involved in the attack.

Al-Shabab, the Somalia-based fighter Islamist group responsible for the attack on West Gate Mall in 2013, claimed responsibility for this attack. The group was also responsible for “two attacks in Mandera county in late 2014, in which a total of 64 people were killed,” as well as other smaller attacks. According to the New

York Times, “the Shabab has killed hundreds of Kenyans—on country buses, in churches, in a quarry last year where they marched off miners before dawn and also made them lie face down in rows.” These attacks have been especially prevalent since October 2011, mainly as retaliation for Kenya’s military troops entering Somalia to fight against al-Shabab.

Survivors of the attack on Garissa claim that the gunmen urged students to step out of their dormitories if they wished to survive, claiming that the alternative was death. However, the gunmen allegedly began shooting students as they flooded out, or forced students to lay down in rows where they proceeded to execute them with gunshots to the head. Some survivors also recounted instances where the attackers ordered students to call their parents and make it known that this attack was in response to “Kenya’s military intervention in Somalia.” Although it appears that most students were killed indiscriminately, the majority of the victims are said to be non-Muslims.

The condemnation of al-Shabab’s acts were unanimous—even a group of ethnic Somali men “marched down Garissa’s main road to show solidarity with the victims.” In the wake of the attack, there appears to be growing resentment of the Kenyan government. Despite the impending possibility of such attacks, the security at Garissa University was minimal, comprised of only two guards. Human Rights Watch (HRW) also argues that “Kenya’s efforts to tackle rising insecurity have been marred by serious human rights violations:” limited freedom of expression, “extrajudicial killings, enforced disappearances, arbitrary detentions, and torture by security forces.”

Articles 48 through 51 of the Kenyan Constitution ensure that all persons have access to justice and that their rights to due process are upheld. Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), of which Kenya is a state party, prohibits the arbitrary deprivation of life, and torture, respectively. Although Article 4 of the ICCPR acknowledges a country’s need to employ certain extreme measures “in time of public emergency

which threatens the life of the nation,” it clearly states that there should never be any derogation from Articles 6 and 7, among others.

Deputy Africa Director of HRW, Leslie Leffkowitz, understands the “shock and anger” caused by the Garissa attack. However, he argues that “law enforcement operations that respect Kenyan and international law are essential” to preserving basic human rights, especially those of the Muslim and ethnic Somali persons against whom Kenyan police and soldiers are discriminating. Further, given Garissa’s proximity to Somalia, the Kenyan government was aware of the city’s and university’s “vulnerability to [al]-Shabab attacks,” yet it “failed to appropriately address” this weakness. “Amnesty International emphasizes the Kenyan government’s responsibility to guarantee the human rights of all its citizens within the boundaries of the Constitution and the law,” which includes safe educational institutions for its students and teachers.

*By Stefania Butoi Varga, staff writer*

## **HUMAN RIGHTS CONCERNS AHEAD OF BURUNDI’S 2015 ELECTIONS**

On April 15, 2015, the United Nations (UN) High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, referred to Burundi’s 2015 general elections as a “critical moment” in the nation’s history with a chance for the country to choose “the path of free and fair elections which would strengthen and mature Burundi’s still fragile democracy, and enable an improvement in its dire socio-economic situation.” However, since then, violent demonstrations have claimed the lives of at least twenty-seven people. The fighting erupted after the country’s ruling party, the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD), nominated President Pierre Nkurunziza on April 26, 2015, as its presidential candidate for a third term, a move that some Burundians say violates the country’s constitution and the Arusha Peace and Reconciliation Agreement. Supporters, however, argue that Nkurunziza’s candidacy violates neither law be-

cause the parliament elected Nkurunziza to his first term, not the people. Discontent surrounding the election has continued to mount.

On May 14, 2015, violence continued after an attempted coup organized by a group of military officers failed. Although officials arrested several officers purportedly involved in the coup, the whereabouts of the group's leader, Godefroid Niyombara, remain unknown. Following the coup attempt, public protests resumed on May 18 in Bujumbura despite the government's threat of arresting demonstrators as "accomplices" to the attempted overthrow. Although the government stated in a press release that it would not take revenge, its actions seem to demonstrate otherwise. According to a report by the UN, hundreds of people remain detained in extremely overcrowded conditions "with detainees having to sleep standing up." The UN Refugee Agency estimates that over 100,000 Burundians have fled the country as a result of the pre-election violence, seeking refuge across the borders of Rwanda, Tanzania, and the Democratic Republic of the Congo.

The violence has prompted international concerns over the Burundian government's protection of fundamental human rights including freedom of expression and the right to peaceful assembly, rights guaranteed under Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 19 and 21 of the International Covenant on Civil and Political Rights. Since the onset of demonstrations, there has been a "communications clampdown" in the country, with the government blocking social media platforms such as Twitter, Facebook, Viber, and Whatsapp, as well as independent radio stations. Adama Dieng, the UN Special Adviser on the Prevention of Genocide, noted, "the absence of independent voices through non-State media was contributing to tensions." During his recent visit to the country, the UN High Commissioner for Human Rights stressed that "criticism is a vital element of democracy, not a threat that must be crushed. The right to freedom of expression and opinion is enshrined in international treaties ratified by Burundi, and the Government is obliged to uphold those treaties."

Furthermore, the alleged use of live ammunition by government security forces during protests prompted the Office of the UN High Commissioner for Human Rights to urge authorities to fully comply with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The principles call upon security officials to employ nonviolent means before resorting to any use of force, and to only employ force when appropriate in proportion to the seriousness of the offense, or when strictly unavoidable to protect life. The African Union's Peace and Security Council has also adopted a resolution condemning "any attempt to seize power by force" and stressing "the imperative for all Burundian stakeholders to settle their differences through peaceful means." In addition, the European Union has suspended \$2.3 million aid to Burundi unless "conditions for a free, peaceful and credible election are secured."

In response to the violence, UN Secretary-General Ban Ki-moon has urged Burundi's government "to uphold the human rights of all Burundians, including the freedoms of assembly, association and expression, and to take concrete steps to prevent political killings and violence." In a separate statement, the UN Security Council recalled its "intent to respond" to violent acts that undermine peace and security in the country. The United States has advised President Nkurunziza to renounce his candidacy. John Kirby, a spokesperson for the U.S. Department of State echoed this sentiment by stating, "President Nkurunziza's decision to disregard the term limit provision of the Arusha Accords has destabilized Burundi and the sub-region, triggered violence, and endangered Burundi's economic well-being."

Although the coup attempt ultimately failed, Burundi's future stability remains unclear, sparking rumors of another civil war in a country with a longstanding history of political unrest. Despite the opposition parties' demand to President Nkurunziza to renounce his third-term bid, whether he will continue to run in the election remains tentative.

*By Andrea Flynn-Schneider,  
Social Media Editor*